United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7380

United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter of the Complaint of Singapore Navigation Company, S.A., as owner of the Steamship SINGAPORE TRADER and China Marine Investment Co., Ltd. and China Overseas Navigation Co., Ltd., Plaintiffs, for exoneration from or limitation of liability.

SINGAPORE NAVIGATION COMPANY, S.A., CHINA MARINE INVESTMENT CO., LTD., CHINA OVERSEAS NAVIGATION CO., LTD.,

Plaintiffs-Appellants,

MEGO CORP., ET AL., JOSEPH MARKOVITS, ET AL., UNITY SEWING SUPPLY CO., ET AL., INTERNATIONAL SEAWAY TRADING CORP., ET AL., KATONE CORP., ET AL., SPARTAN INDUSTRIES, ET AL., ALSTER IMPORT CO., LO-E MANUFACTURING CORP.,

Cargo Claimants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS SINGAPORE NAVIGATION COMPANY, S.A., CHINA MARINE INVESTMENT CO., LTD., AND CHINA OVERSEAS NAVIGATION CO., LTD.

KIRLIN CAMPBELL & KEATING
Attorneys for Plaintiffs-Appellants
120 Broadway
New York, New York 10005

LAWRENCE J. BOWLES
DAVID W. MARTOWSKI
CHARLES N. FIDDLER

Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7380

In the Matter of the Complaint of Singapore Navigation Company, S.A., as owner of the Steamship SINGAPORE TRADER and China Marine Investment Co., Ltd. and China Overseas Navigation Co., Ltd., Plaintiffs, for exoneration from or limitation of liability.

SINGAPORE NAVIGATION COMPANY, S.A., CHINA MARINE INVESTMENT CO., LTD., CHINA OVERSEAS NAVIGATION CO., LTD.,

Plaintiffs-Appellants,

MEGO CORP., ET AL., JOSEPH MARKOVITS, ET AL., UNITY SEWING SUPPLY CO., ET AL., INTERNATIONAL SEAWAY TRADING CORP., ET AL., KATONE CORP., ET AL., SPARTAN INDUSTRIES, ET AL., ALSTER IMPORT CO., LO-E MANUFACTURING CORP.,

Cargo Claimants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS SINGAPORE NAVIGATION COMPANY, S.A., CHINA MARINE INVESTMENT CO., LTD., AND CHINA OVERSEAS NAVIGATION CO., LTD.

The Misstated "Issue" and "Statements" in Cargo's (Appellee's) Brief

1. ***Cargo misstates the "issue" presented for review.***

The issue presented for review, according to cargo, is no issue at all, since it mistakenly assumes that this Court

has already decided that the shipowner (appellants) committed an "unreasonable deviation."

Cargo's alleged issue, when read in its entirety, as follows, clearly reaches the point of absurdity:

> "Does a shipowner who personally orders an unreasonable geographical breach of the contract of carriage by violating a direction for a specific and feasible port of destination retain the benefits of the Carriage of Goods by Sea Act and the Limitation of Liability Act, when his personal violation causes damage to cargo?"

The real issues on this appeal, of course, include whether, considering all the circumstances, the shipowner exercised reasonable discretion in diverting the SINGAPORE TRADER to Detroit instead of to the congested port of Valleyfield, whether this was a "deviation", and, if so, whether such deviation was reasonable.

Cargo's bold misstatement of "the issue" sets the tone of its entire brief. As will be clearly demonstrated, cargo also misstates the facts, the holding of the District Judge and the law. In essence, cargo has totally failed to respond to the shipowner's brief. Cargo's brief will be of no assistance to this Court.

2. *Cargo repeats factual arguments specifically rejected by the District Judge.*

Without any indication that the District Judge specifically rejected its mistaken arguments, throughout its brief, cargo makes a series of factual assertions concerning (1) the shipowner's alleged "cursory" or "inadequate" investigation of alternate ports after the I.L.A. strike made it mandatory for the SINGAPORE TRADER to leave New

York and (2) the alleged availability of a number of various Canadian Ports for the SINGAPORE TRADER and her cargo—as if the appeal were a trial *de novo,* of which no vestige remains, as discussed at pp. 18-19 *infra.*

An example of cargo's error appears at brief pp. 11-12 where cargo states, referring to a number of Canadian ports:

> "There are some faint reference in the testimony that investigation disclosed that those ports would not or could not take the SINGAPORE TRADER, but the fact is that no investigation at all was conducted; the ship could have been discharged at Valleyfield, Halifax, Quebec or Montreal."

Cargo totally overlooks (and fails to inform this Court) that the District Judge specifically rejected cargo's mistaken arguments on these points.

The District Judge found that the shipowner's agent Gannet "made good faith efforts to ascertain conditions in Canada and that it acted reasonably in reporting to its principal" [the shipowner] and that the shipowner relied on Gannet in ordering the ship to go to Detroit (120a).

Specific findings of fact by the District Judge show the reasonableness and accuracy of the shipowner's investigations of the alternate ports. He found that the shipowner's investigation correctly determined that the I.L.A. labor unions at the major Canadian ports including Halifax, St. John, Montreal and Quebec *would not* discharge the SINGAPORE TRADER'S "hot cargo"; and the District Judge specifically rejected cargo's arguments that the SINGAPORE TRADER could have used those ports by the "ignoble" practice of "forging ship's documents" (118a-119a).

The shipowner's investigation of a number of minor, non-I.L.A., Canadian ports—including Valleyfield—also established that they were congested, they had inadequate facilities and there would be long delays to the cargo in all such ports. *Cargo wholly overlooks the fact that the District Judge specifically found that Valleyfield had less efficient facilities than Detroit and that Valleyfield "was congested"* (119a)—thereby fully recognizing the diligence and accuracy of the shipowner's investigation of alternate ports. (See the Shipowner's Brief, pp. 8-13 and 37-39.)

By renewing its specious arguments on this appeal concerning the situation at all Canadian ports, cargo clearly recognizes that its position on this appeal is untenable. But if cargo disagreed with the District Judge's findings—cargo should have filed a cross appeal. Having failed to appeal, cargo has *no* basis in attempting to re-litigate these factual issues, which, in any event, are *not* clearly erroneous.

In misstating the facts, cargo apparently seeks to take advantage of the somewhat confusing and inconsistent manner in which District Judge Brieant made his findings and conclusions, which does not ease the degree of perception needed to understand what the District Judge actually found and concluded.

The fact is that the District Judge's underlying grounds for his decision are contained in:

(1) The Memorandum Decision (107a-124a);

(2) The Agreed Facts (64a-74a);

(3) The signing of "Additional Findings of Fact Proposed by Plaintiffs," with deletions and inserts initialed by the District Judge (75a-95a);

(4) The signing of "Proposed Findings of Fact on Behalf of the Cargo Claimants" with deletions and inserts initialed by the District Judge (100a-103a); and

(5) The signing of "Proposed Conclusions of Law on Behalf of Cargo Claimants" with deletions and inserts initialed by the District Judge (104a-105a).

But this state of the record furnishes no excuse for cargo's substitution of its own factual inventions for the findings of the District Judge.

3. *The fundamental error of the District Judge was that he construed the bill of lading contract so narrowly that he improperly eliminated all choice or discretion on the part of the shipowner to consider the reasonableness of using any port other than the nearby "non-U.S. port" of Valleyfield which he also found was congested and at which long delays to the cargo were anticipated.*

When the chaff concerning the situation at all Canadian ports is stripped away, it becomes perfectly clear that the District Judge held that the SINGAPORE TRADER unreasonably deviated simply because she did not enter what he found to be the *only* "feasible" Canadian port—the minor port of Valleyfield—which the District Judge inconsistently, but correctly, found had less efficient facilities than Detroit, and which port the District Judge also correctly found "was congested."

This holding apparently arises from the District Judge's erroneous view that the stamp on the face of each bill of lading contract did not supplement printed clause 5 of the bill of lading which recited, in general terms, the right (and duty) of the shipowner to alter the voyage to avoid delays caused by strikes or absence of commercially adequate facilities for the discharge and delivery of the cargo.

Instead of holding (as he should) that the stamped claus merely clarified (under clause 5) the right of the shipowner to discharge the cargo outside of the continental United States [which in the absence of such provision might be considered unreasonable]—if such ports had been reasonably available and suitable for this cargo, the District Judge held in effect that the stamp *absolutely prohibited* the shipowner from exercising any choice or discretion to utilize a discharging facility other than the "nearest non-U.S. port(s)." He thus improperly disregarded the shipowner's careful analysis of the alternatives (based on the sound advice of local businessmen) and the shipowner's reasonable choice that here, Detroit was "the best alternate port" where this Christmas cargo should be discharged and delivered without any risk of delay due to strikes (direct or indirect) at the major Canadian ports or due to congested and inadequate facilities at the minor Canadian ports including Valleyfield.

Cargo concedes that the SINGAPORE TRADER'S cargo was "primarily Christmas goods," as the District Judge found (117a). And although the District Judge at the beginning of the trial thought the ship deviated if she left New York (265a), he later held that the purpose of the contract of carriage would be frustrated if the cargo became strikebound, either at New York or in the Canadian I.L.A. ports (117a-119a). What the District Judge apparently overlooked was: (1) that the contract would also be frustrated if the cargo were delayed in reaching the Christmas market from *any* cause; and (2) that here the shipowner, after a careful analysis of all the existing facts and circumstances, decided to use Detroit rather than the congested and unsuitable port of Valleyfield among other minor Canadian ports—solely to avoid long delays to the cargo reasonably anticipated at those ports.

While the terms of the contract are one element in considering whether a course of conduct is permissible (or required) and whether a course of conduct is reasonable—the contract is not the only element. The bill of lading contract is subject to the COGSA requirements, 46 U.S.C. §1303(2), that the shipowner "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." Ultimately, as a matter of law, the question of the reasonableness of the shipowner's course of conduct must be determined on whether he exercised a deliberate and considerate judgment, as a matter of foresight, based on *all* the then existing circumstances including all the terms of the contract, the interests of all parties concerned, the motive, i.e. whether to benefit the shipowner, or cargo or both jointly, and whether the shipowner was guilty of fault or negligence in his action.

Here the District Judge clearly manifested an incorrect conception of the applicable law when he limited his consideration of reasonableness to an isolated contract provision—which led him to an illogical result.

Fundamentally the District Judge erred because he held —not that the shipowner (on the facts) made the wrong choice of an alternate port—but that the shipowner *had no* choice of alternate ports except among nearby non-U.S. ports—apparently regardless of whether they were congested, or whether their use would cause long delays to the Christmas cargo. This is a form of absolute liability, which is based on hindsight, because an accident, for which the shipowner was exempt from liability to cargo, later occurred.

This appeal should be granted.

REPLYING TO CARGO'S POINT I

No Deviation Occurred. The Diversion to Detroit Constituted a Reasonable Exercise of Discretion, Considering All the Circumstances, and Was Thus an Alternate Mode of Performance of the Contract Reasonably Authorized by the Contract and COGSA, 46 U.S.C. § 1303(2).

After the I.L.A. strike made it mandatory for the SINGAPORE TRADER to leave New York, the shipowner's duty—under COGSA and all the terms of the bill of lading contracts—was to divert her to the best alternate port where her cargo of Christmas goods could be discharged and delivered without any further delay. There was no point in going to any foreign port, or indeed to any alternate port, unless such action would achieve the commercial purpose of the parties to the transaction.

In Point I, cargo again misrepresents the facts as to the status of the various Canadian ports and omits any reference to the District Judge's finding as to the relative inefficiency of Valleyfield's facilities and his finding that Valleyfield "was congested." (The facts are clearly stated in the Shipowner's Brief, pp. 8-13 and 37-39.)

Further, cargo makes no reply whatever to the applicable law outlined in the Shipowner's Brief, Point I A, pp. 21-29—which establishes that the shipowner has not only the right—but the duty—to alter the voyage when necessary to comply with his obligations to cargo under COGSA as well as under the bill of lading; and that here, as he complied with those obligations—no deviation occurred.

Cargo apparently fails to recognize the full import of this Court's comments in *Hellenic Lines* v. *U.S.A.*, 512

F.2d 1196, 1206 (2 Cir. 1975) cited at p. 9 of its brief, which states in material part:

> "*Yet the clear plan of COGSA is to differentiate between reasonable deviations, which are without legal consequences, and unreasonable deviations, which entail serious ones.* (Emphasis supplied.) *Any such clause must be construed in light of the carrier's basic duty, § 3(2), to 'properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried' in line with the agreement of the parties.* (Emphasis supplied.) 'Thus, it would appear that, even under such a voyage clause . . . , a deviation occurs when the liberties conferred by the clause are pushed beyond reasonableness, *in the light of the carrie.'s duties to cargo.*' Gilmore & Black, supra, § 3-40, at p. 178 (emphasis supplied by Court)"

The rule is that broad liberties clauses must be construed or limited by the courts—under COGSA—only to authorize reasonable departures from the contract voyage. But the corollary is that narrow clauses must also be construed or expanded to permit or require reasonable alterations in the voyage when necessary.

This corollary rule was followed in *Crelinsten Fruit Company* v. *The MORMACSAGA*, [1968] 2 Lloyd's List 184, 190-191 (Canada), where the shipowner was held liable to cargo basically because the shipowner made a too narrow reading of the terms of his contract when he failed to make a reasonable alteration of the voyage to comply with his duties to cargo under COGSA.

Cargo also concedes at brief p. 22 that:

> "Indeed, even without a liberties clause, he [the shipowner] would have the right to choose an alternate

> port as a practical solution, but his decision would still have to be reasonable."

The courts have recognized this view. *The Wildwood,* 133 F.2d 765, 767 (9 Cir. 1943), and cases cited.

Unquestionably, in a proper context, the element of choice exists and not only may but *must* be *reasonably* exercised by the shipowner—COGSA requires the exercise of reasonable choice, when necessary.

In sum, COGSA's requirements take precedence over clauses which are too broad or too narrow—and govern the shipowner's duties if there are no applicable clauses at all.

The degree of choice will, of course, vary with the circumstances. In cases such as *Hellenic Lines* v. *U.S.A., supra,* where the shipowner diverted the ship *solely* to pick up additional revenue cargo, the liberties clause was properly construed or limited to eliminate such choice on the part of the shipowner. In *Surrendra (Overseas) Private, Ltd.* v. *SS Hellenic Hero,* 213 F.Supp. 97 (S.D.N.Y. 1963), aff'd per curiam 324 F.2d 955 (2 Cir. 1963), the shipowner diverted the ship from one discharge port to another for his own convenience and was held to have unreasonably deviated. But the District Judge noted at pp. 101-102:

> "The propriety of any particular deviation from the route of a vessel's contractual voyage is a question of fact in each case. It is a question of inherent reasonableness which depends upon all the surrounding circumstances. . . . But even assuming that the HELLENIC HERO was in regular liner service the respondent has in any effect utterly failed to show the deviation was reasonably necessary in order to accommodate its obligation to other cargo interests. . . . On

> board the HELLENIC HERO at the time of the deviation were 989 and 165 long tons of cargo destined for Calcutta and Chittagong, respectively, the only two remaining ports on the outbound voyage. *But the respondent made no showing that there was any urgency whatsoever concerning the time of HELLENIC HERO's arrival at the latter ports which in any way influenced its decision to deviate. . . .*" (Emphasis added.)

Thus, if the shipowner could have shown that the decision to divert the ship was based on the proper requirements of other cargo on the ship—no deviation might have occurred, or if so, it might have been reasonable.

Other cases specifically approving the shipowner's action in exercising discretion to alter the voyage to avoid delays are outlined in the Shipowner's Brief, pp. 21-22, 25-29, 35-36.

In another context, the language this Court used in *Esso Standard Oil S.A.* v. *SS Gasbras Sul,* 387 F.2d 573 (2 Cir. 1968) concerning the exercise of choice based on foresight (not hindsight) is most instructive. There, this Court reversed the District Judge's conclusion that the master of the GASBRAS SUL was negligent in causing damage to Esso's terminal in Guatemala.

This Court said at p. 578:

> "Captain Dahle was aware at 1700 that the discharging operation could not be completed until after dark. *He weighed all of the circumstances and considered whether to suspend the operation and leave the terminal.* He discussed the matter with Chief Officer Olsen and it was their *considered judgment* that 'it was not so bad that we couldn't discharge the cargo and go out after finishing.' *This was not a case of*

heedless disregard of conditions or of reckless taking of chances in plain view of imminent danger." (Emphasis added.)

And at p. 580:

"*Here the trial court erred in not passing upon each of what it considered Captain Dahle's three mistakes in judgment,* i.e. in deciding not to leave the mooring at 1700, at 1800-1900 and at 2130, *in the light of circumstances known at each of those times and what was reasonably foreseeable at each of those times. By viewing each occasion retrospectively in the light of all that occurred through the morning of the next day, it imposed upon Captain Dahle a duty to foresee future happenings which were mere possibilities and of which there was, at the time he exercised his judgment, no evidence. The master of a vessel caught in an emergency where he is forced to choose between risky alternatives, is entitled to a wide range of discretion in deciding what to do, provided it is a reasonable exercise of current standards of nautical knowledge and skill under the circumstances. It does not become negligence because the decision he makes may later, in the light of subsequent events revealed through hindsight, be shown to have been wrong.*" (Emphasis added.)

See also *The Styria,* 186 U.S. 1, 9, 10, 13, 15, 19, 22, 23 (1902).

Thus, clearly, some element of choice of reasonable alternatives always exists. The degree of choice depends upon all the surrounding circumstances.

Here, the issue of whether the SINGAPORE TRADER deviated should have been decided on the basis of whether

the shipowner showed a reasonable exercise of judgment based on the information available to him at the time—as measured on the basis of *foresight* and not *hindsight* simply because an unforeseen accident later occurred.

Certainly the District Judge erred as a matter of law in construing the bill of lading terms so narrowly as to remove *all* elements of choice—which ultimately led to an illogical result. Except for this error, the District Judge would clearly have found no deviation, because he correctly found that "discharge at Detroit, Michigan, probably would have constituted compliance with an alternate mode of performance reasonably authorized by the contract" (112a), and he fully recognized that Detroit "was indeed among the best available safe and convenient ports" (117a).

Considering all the circumstances, the diversion to Detroit was based on the exercise of reasonable choice or discretion permitted (if not required) by COGSA and the bill of lading contract. This Court should conclude that *no* deviation occurred.

REPLYING TO CARGO'S POINT II

The Deviation, If Any, Was Reasonable. Thus, No Liability Exists to Be Limited.

Cargo continues to assert a wholly misleading statement of facts regarding the shipowner's investigation of the Canadian ports. Cargo's insensitivity to accuracy does it no credit.

Cargo seems incapable of dealing with the issues regarding the proper legal standards to be applied in determining whether an alleged deviation was reasonable—in the context of the facts of this case. Thus, it ignores the

authorities cited in the Shipowner's Brief, pp. 21-39, which require the courts to consider all relevant circumstances existing at the time including all the terms of contract, the interests of all parties, the motive, i.e. whether to benefit the shipowner or cargo or both jointly and whether the shipowner was negligent or whether he acted prudently.

Cargo's recitation of cases such as *The Lafcomo,* 49 F. Supp. 599 (S.D.N.Y. 1943), aff'd 138 F.2d 907 (2 Cir.), involving specific acts of shipowner misconduct are inapplicable here since there is not one iota of criticism by the District Judge of the shipowner or his agents. Certainly negligence did not exist in this case.

Also inapplicable here are cases such as *The Pelotas,* 66 F.2d 75 (5 Cir. 1933) involving deviations solely to load or discharge revenue bearing cargo other than the cargo in suit. In such cases the motive for the deviation benefits the shipowner alone.

Here, the shipowner has shown that the sole motive for the diversion to Detroit was that, based on a reasonable and accurate investigation, he concluded that Detroit was the best alternate port at which the cargo could be discharged and delivered without any risk of delay—a benefit to cargo.

This court has approved, as reasonable, deviations which benefit the shipowner and cargo jointly. *Irwin Feuer* v. *Booth Steamship Company,* 195 F.2d 529-1 (2 Cir. 1952), affirming *American Cyanamid Company* v. *Booth Steamship Company,* 99 F. Supp. 232, 236-237 (S.D.N.Y. 1951) discussed in the Shipowner's Brief at pp. 21-22, 35-36. The District Judge improperly overlooked this decision, apparently because of his erroneous interpretation of the contract which eliminated *all choices* by the shipowner. Thus, the District Judge apparently did not consider mo-

tivation or benefit to cargo in his analysis. Cargo has failed to distinguish *Booth Steamship*. Indeed it cannot do so, and makes no attempt.

Regarding the shipowners' alternate demand for limitation of liability, cargo fully recognizes, at brief p. 20, that the term "privity and knowledge" under the limitation statute, 46 USC § 183, means personal participation in or knowledge of "some fault or act of negligence" on the part of the shipowner. But since no fault or negligence exists here, there can be *no liability* and thus *no liability to be limited.*

Cargo's comment regarding cargo insurance, at brief p. 22, is an act of dissembling. If cargo lost its insurance because of the alleged deviation, the Court can be sure that the cargo attorneys would have promptly (and loudly) informed the Court. No one better than the cargo attorneys know the truth on the question of the cargo insurance.

This Court should conclude that the deviation, if any, *was reasonable.*

REPLYING TO CARGO'S POINT III

The District Judge Clearly Erred in Accepting Cargo's Mistaken Argument Regarding the Alleged Financial Benefits to the Shipowner in Using Detroit.

On this appeal, the shipowner has challenged only one finding by the District Judge: that the SINGAPORE TRADER was ordered to Detroit "at least in part" for the shipowner's "economic convenience." The shipowner has shown this finding to be "clearly erroneous." (See its Brief pp. 13-17.) The basis for the finding is that the discharging costs at Detroit were less than at New York. But this incidental fact was wholly unrelated to the decision to go to Detroit, when in fact New York was strikebound.

Since, because of the I.L.A. strike, the ship had to leave New York—in any event—any differential in discharging costs between New York and Detroit is wholly incidental and could have played absolutely *no* part in the choice of alternate ports. Cargo's argument is absurd.

Cargo's argument might make sense if the telex dated October 6, 1971 (Ex. 13 X) had said "Go to Detroit because it is cheaper than Montreal [or some other Canadian port]." But the relative discharging costs between the various alternate ports played no part in the choice of alternate port. [In fact, the discharging costs at all Canadian ports were equal to or less than at Detroit. See the Shipowner's Brief p. 14.] Each Canadian port was ruled out because of reasonably anticipated long delays; and the rate at Detroit was negotiated after it was determined that Detroit was the "best alternate port."

By its telex to Gannet (Ex. 13 AA), the shipowner shows that he found no financial benefit in going to Detroit—he sought to charge part of his extra voyage costs to cargo. Unfortunately for him, the contract would not permit such action and *no such demands were ever made on the cargo.* The notice sent to cargo (Ex. 14) makes no such demands. None are included in Gannet's correspondence with the agent and stevedore in Detroit (Ex's. S. and T.).

Regarding Valleyfield, the shipowner's comments on that port (including the use of that port by the DAGRUN to discharge automobiles on an open dock) are stated in its Brief pp. 37-39.

Regarding the diversion notice, cargo commits a further act of dissembling in its comment at brief p. 25 that:

> "There is no way of telling when the consignees received actual word [of the diversion] or even whether they knew of the stamp on the bill of lading."

The consignees are the nominal cargo claimants [the underwriters are the real parties in interest] who presumably gave their files to these cargo attorneys. Thus, information on when the cargo interests received the diversion notice is uniquely within the possession of the cargo attorneys. If helpful to them, certainly the cargo attorneys would have brought out that information as challenged to do so at the trial (264a).

At brief p. 25 cargo also misrepresents the time elements concerning the diversion notice. Gannet made its recommendation to use Detroit on October 6, 1971, after investigating (Ex. 13 X). The shipowner responded on October 7, 1971 (Ex. 13 Y). This ship left New York on October 8, 1971. As Ex. 13 X, last paragraph, shows it was urgent that the ship proceed promptly to Detroit. At most, there was a one day period between the decision and the departure of the ship. Certainly there was not enough time to communicate with the owners of 472 bills of lading.

Cargo has made no proper response to the shipowner's demonstration of the clearly erroneous nature of the District Judge's finding concerning the alleged financial benefit to the shipowner in using Detroit. This finding should be set aside. But even if it is not, the appeal should still be granted under *Booth Steamship, supra,* which held that deviations which benefit *both* the shipowner and cargo *are reasonable.*

REPLYING TO CARGO'S POINT IV

All Vestiges of Trial *De Novo* on Appeal Were Eliminated by the 1966 Amendments to the Federal Rules of Civil Procedure. Cargo Has No Basis for Seeking to Relitigate Facts Found Against It by the District Judge.

As if this appeal were a trial *de novo,* cargo blindly repeats—without quotes and with a few changes—the arguments it submitted to the District Judge after trial and which, on the whole record, were properly rejected by the District Judge. Compare: Cargo's "Brief After Trial," pp. 2-10, Document No. 53, Record on Appeal with cargo's arguments in its brief here pp. 7-8 concerning Valleyfield, and pp. 28-33 concerning Montreal, Quebec and Halifax. The arguments in cargo's two briefs are virtually identical. Compare also: "Plaintiff's [Shipowner's] Reply Memorandum to Cargo Claimants Brief After Trial," pp. 4-19, Document No. 64, Record on Appeal, with the facts as found by the District Judge.

Cargo fully recognizes that its position on this appeal is untenable. Its only recourse, to try to sustain its position, is to try to change the facts found by the District Judge. Indeed cargo has *not* even the shadow of a claim unless it distorts both the facts and the law—as it clearly has.

But if cargo disagreed with the District Judge's findings as to the congested nature and inadequacy of the facilities at Valleyfield, and/or the fact that the Canadian I.L.A. ports including Montreal, Halifax and Quebec, would not discharge the vessel (118a-119a), cargo should have cross appealed and at least attempted to show that the findings with which it disagreed were "clearly erroneous." But

cargo does not even allege that the District Judge's findings are "clearly erroneous," it merely states at brief p. 33:

> "If this court should find the trial court in error that Valleyfield could have taken this cargo, appellees request this Court to pass on the feasibility and availability of Quebec, Montreal and Halifax. It is appellees' position that those ports as well as Valleyfield could and should have been employed by appellants."

Cargo has no basis to relitigate these findings—which are not clearly erroneous under the Rule 52(a) test and are fully supported by the overwhelming weight of evidence. In essence, cargo improperly seeks a trial *de novo* in admiralty on this appeal the last vestiges of which have long since been abolished by the 1966 unification amendments to the Federal Rules of Civil Procedure and which are now prohibited by Rule 52(a).

As a matter of a reasonable exercise of discretion, based on all the facts and circumstances *then* known to the shipowner (including the fact of the seasonal nature of this Christmas cargo wanted for the 1971 market), he chose to divert the SINGAPORE TRADER to Detroit where, although such action slightly extended the voyage, the cargo would be promptly discharged and delivered without any risks of delay. This act benefited cargo.

The shipowner had both the right and the duty to make a choice between Valleyfield and Detroit under any fair consideration of the facts and the law. Unquestionably his choice showed a reasonable regard for the interests of all concerned in the voyage. No deviation, certainly no unreasonable deviation, occurred.

CONCLUSION

The Interlocutory Judgment below should be reversed. The diversion of the SINGAPORE TRADER to Detroit was not an unreasonable deviation. The shipowner is entitled to: (a) exoneration from liability to cargo under 46 U.S.C. §§ 1304(2)(a) and (j); (b) judgment against the cargo owners on his counterclaims for general average contributions and unpaid freight; and (c) costs.

Respectfully submitted,

KIRLIN, CAMPBELL & KEATING
Attorneys for Plaintiffs-Appellants
Singapore Navigation Company, S.A.,
China Marine Investment Co. Ltd.
and China Overseas Navigation Co., Ltd.

LAWRENCE J. BOWLES
DAVID W. MARTOWSKI
CHARLES N. FIDDLER
Of Counsel